City & HRA v. L. 371, SSEU, 61 OCB 48 (BCB 1998) [Decision No. B-48-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration	:	
	:	
-between-	:	
	:	
THE CITY OF NEW YORK and the HUMAN RESOURCE ADMINISTRATION,	:	
	:	Decision No. B-48-98
Petitioners,	:	Docket No. BCB-1928-97
	:	(A-6823-97)
-and-	:	
	:	
SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371, AFSCME, AFL-CIO,	:	
	:	
Respondents.	:	

INTERIM DECISION AND ORDER

On July 28, 1997, the Human Resources Administration and the City of New York (hereinafter referred to as "HRA" or "City"), appearing by its Office of Labor Relations ("OLR"), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Social Services Employees Union ("SSEU"), Local 371, AFSCME, AFL-CIO ("Local 371" or "Union"). The Union filed a motion to amend its request for arbitration on October 31, 1997. The City filed its answering affidavit in response to the Union's motion to amend on February 18, 1998. The Union requested that the Board address their motion before proceeding with the remainder of the matter. We now address the question of whether the Union may amend its request for arbitration subsequent to its filing.

BACKGROUND

The grievant was employed by the Human Resources Administration ("HRA") as a per diem Fraud Investigator. The grievant was hired on June 15, 1995 and was discharged on December 23, 1996. On January 16, 1997, the grievant filed a Step II grievance alleging that she was terminated in violation of Article VI of the SSEU Local 371 contract and HRA Procedures 92-18 "Americans with Disabilities Act Grievance Procedure" and 95-16, "Americans with Disabilities Act Grievance Procedure for Clients/Applicants."[1] The grievance stated,

> On 1-6-97 I reported to 330 Jay St for a possible transfer. I was met by Mr. Ornato, who handed me a fax letter, dated 12-23-96 and signed by Jane A. Roeder. The letter stated, my service was no longer needed.
>
> I am on disability for an on-the-job injury that occurred on 11-18-96. I am grieving this dismissal due to the fact that it is prejudicial since the injury occurred on city-time, doing city-work.
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> I was also taken to the hospital by ambulance the day of the accident. I filed worker's compensation and have been under medical care to the present for the said on-the-job injury. I have not been paid any money, whatsoever for loss of my ability to work and,

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[1] HRA Procedure No. 92-18 and 95-16 are exactly the same in content. However, HRA Procedure 92-18 applies to staff and 95-16 applies only to clients and applicants. They read, in pertinent part:

PURPOSE

The intent of this procedure is to inform the public, and staff who provide direct services, that HRA has implemented the Americans With Disabilities Act Grievance Procedure to handle complaints of discrimination from persons with disabilities.

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GENERAL INFORMATION

. . . A provision of the ADA mandates employers to maintain a procedure to address complaints of discrimination from persons with disabilities. As such, the Human Resources Administration has implemented the attached internal grievance procedure providing for prompt and equitable resolution of complaints alleging any action prohibited by the U.S. Department of Justice regulation under Title II of the Americans With Disabilities Act. . .

. . . Complaints should be addressed to [the Director of Disability Access and Compliance], who has been designated to coordinate ADA compliance efforts for the Human Resources Administration. . .

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WHEN TO FILE A COMPLAINT

A complaint should be filed by anyone who believes that he/she has been discriminated against based on disability in any HRA program.

also, I am aware of my medical bills for the injury that have to be paid.

On April 9, 1997, HRA issued a Step II decision denying the grievance, reasoning that, as the grievant did not yet work two continuous years as required for a per diem to be considered an "employee," there was no right to file a grievance.

On May 5, 1997, the grievant filed at the Step III level. On June 10, 1997, the OLR issued a Step III decision. On July 23, 1997, OLR issued a corrected Step III decision. The Step III Hearing Officer denied the grievance on the grounds that HRA Procedure 95-16 only applies to clients and applicants, and is inapplicable to the complainant. Although Procedure 92-18 is applicable to the complainant, it continued, the Union did not respond to a written request for a copy of the Step I grievance and the Step I response. The Hearing Officer continued by stating that the record never established that Procedure 92-18 was ever invoked, and absent such invocation, no violation of the procedure could occur. On July 2, 1997, the Union filed a request for arbitration. The Union claimed that the City had violated Article VI of the SSEU, Local 371 Contract and HRA Procedure Nos. 92-18 and 95-16 by dismissing her. The grievant stated the grievance as, "I am a disabled employee whom the HRA terminated and retaliated against because I challenged the treatment to which I was subjected to in violation of agency guideline."

The City filed its petition challenging arbitrability on July 28, 1997. The Union filed a motion to amend its request for arbitration on October 31, 1997. The Union wished to amend its request for arbitration by substituting HRA Executive Order No. 618 ("EO 618")[2] in place and

[2] The subject of the Order is listed as "Staff Conduct" and covers staff ethics (general policy, relationships with clients, confidentiality, grounds for disciplinary action, conflict of interest, etc.), use of agency time, equipment, facilities, services and premises, personal appearance, oath of office

instead of HRA Procedures 92-18 and 95-16 as the provision, rule, or regulation allegedly violated. The City filed its answering affidavit in response to the Union's motion to amend on February 18, 1998.

POSITIONS OF THE PARTIES

Union's Position

The Union states that claimed violations of HRA EO No. 618 have been found by the Board to be arbitrable in Decision Nos. B-5-96 and B-14-96. It argues that the granting of the motion by the Board would not change the nature or character of the grievance herein. It states that the only change which would be effected would be the identity of the HRA policy allegedly violated. Moreover, it argues, the provisions of HRA EO 618 and HRA Procedures 92-18 and 95-16 are inextricably intertwined, the gravamen of all three being an adverse personnel action based upon disability. Accordingly, the Union argues that the City cannot legitimately claim surprise or prejudice should this amendment be allowed since, as mentioned, the nature of the grievance would be unchanged.

City's Position

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and discriminatory practices. The section titled "Discriminatory Practices" reads:

> Discrimination by reason of race, creed, color, national origin, religion, ancestry, sex, age, physical/mental handicap, marital status, Vietnam era or disabled veteran status, or sexual orientation is absolutely prohibited. This basic policy shall be applied in all dealings with persons seeking or receiving the services of the Agency, and in the recruitment, assignment and promotion of staff and in other aspects of employment.
>
> In an instance of discrimination against an employee, applicant for employment or client, the person engaging in the discriminatory practice is subject to disciplinary action by the Agency as well as to the sanctions and penalties imposed by the courts and regulatory agencies such as the New York City Commission on Human Rights and the New York State Division of Human Rights.

The City argues that the Union attempts to amend its request for arbitration at the penultimate moment, after relying exclusively on HRA Procedures 92-18 and 95-16, instead of HRA EO 618. It argues that the motion to amend the request for arbitration should be denied because it deprives the City of the right to consider and attempt to resolve the merits of the grievance at the lower steps of the grievance procedure thereby defeating the purpose of the multilevel grievance procedure.[3] It contends that the Union limited its claim to alleged violations of 92-18 and 95-16, two HRA procedures that the Board has previously held were not arbitrable.[4]

It argues that the Union took the grievance through each step of the grievance process without mentioning EO 618 once, and it was only after the City laid out its case in the petition challenging arbitrability that the Union wanted to change the basis of its grievance, arguing that allowing the Union to amend its grievance would not change the nature of the grievance. The City argues that the provisions are not inextricably intertwined, as the HRA Procedures describe how, where and when to file an ADA claim, and that EO 618, Section V only places employees on notice that they will be subject to discipline by the Agency if they engage in discriminatory conduct. Therefore, it argues, the Union's initial allegation that HRA violated HRA Procedures would not put the City on notice that the HRA failed to discipline an employee that engaged in discriminatory conduct under EO 618.

In addition, the City contends that it cannot be credibly argued that the City was on notice of any claimed violation of EO 618 since the Union has raised only claimed violations of procedures

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[3] The City cites Decision No. B-28-97.

[4] The City cites Decision Nos. B-14-96 and B-5-96.

92-18 and 95-16, procedures which are not arbitrable because they do not provide a grievant with any substantive rights under the contractual grievance procedure.[5] It argues that the Board has even held that where the City is initially under no obligation to consider the merits of a grievance, it would deprive the City of the right to consider and attempt to resolve the merits of the grievance at the lower steps of the grievance procedure if the Union were able to amend its grievance at the point of arbitration.[6]

The City argues that in the instant matter, the Union knew or should have known that Procedure 92-18 was found by the Board not to provide any substantive rights for grievants under the contractual grievance procedure. It argues that B-14-96, the case upon which the Union relies to support its contention that EO 618 is grievable, was the same case in which the Board determined that Procedure 92-18 was not grievable and that the Union in the instant matter is the same as the one in B-14-96. In summary, the City argues that despite the Board's rulings, the Union chose to cite only those non-arbitrable procedures at every step of the grievance procedure and again in its request for arbitration. Therefore, it contends, the City, knowing that the procedures cited by the Union were not grievable, would not be under any obligation to consider the Union's claim at the initial steps of the grievance procedure.

Finally, the City states that while the Board generally does not enable technical rules of pleading to infringe upon the arbitration of grievances, the Board also does not permit a party to amend an arbitration request by including the amendment for the first time in an answer to a

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[5] The City cites Decision No. B-14-96.

[6] The City cites Decision No. B-25-87.

challenge to arbitrability. In this instance, the City argues that the Board has refused to entertain a new claim because the Board cannot ignore the essential purpose of the multilevel grievance procedure, which is to permit management an opportunity to resolve the matter in dispute voluntarily.[7] The City argues that the fact that the Union is amending its request for arbitration in a motion rather than amending its claim in its answer is a distinction without a difference that effectuates the same subversion of the collective bargaining process, and this tactic should be just as reprehensible to the Board.

DISCUSSION

Under the grievance process, the parties are required to follow certain definite steps which offer the possibility of self-adjustment by the parties, before any matter can be submitted to final and binding arbitration by an outside neutral. Ideally, a sound, effective, and speedy grievance procedure entails the clear formulation of the issues at the earliest possible moment, adequate opportunity for both parties to investigate and argue the grievance under discussion, and encouragement by the parties of their representatives to explore and conclude settlements at the lower steps of grievances which do not involve broad questions of policy or of contract interpretation. Obviously, none of these elements is achievable if easy amendment of the grievance at the penultimate moment, *i.e.*, at the arbitration step (or thereafter), were to be permitted.[8]

We are not persuaded by the Union's contentions that the nature of the instant grievance would remain the same even if the motion to amend the request for arbitration were granted. The

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[7] The City cites Decision No. B-28-97 and B-25-87.

[8] The Board first discussed this issue in *City of New York v. District Council 37, AFSCME, AFL-CIO*, Decision No. B-20-74.

Union moved through each step of the grievance process relying exclusively on HRA Procedures 92-18 and 95-16, without a single mention of EO 618. It was only after the Union gained the advantage of having the City lay out its case in detail in the petition challenging arbitrability that the Union attempted to change the basis of its grievance. Although EO 618 is a provision dealing with the same broad-based issue, discrimination, as the HRA Procedures, it is fundamentally dissimilar in nature. The purpose of the HRA Procedures is to inform employees of their statutory rights, and to urge them to follow the methods of redress therein, whereas the purpose of EO 618 is to notify employees that a person engaging in discriminatory conduct is subject to disciplinary action. Allowing a Union to change the basis on which the grievance is founded after the petition challenging arbitrability was filed would not only defeat the primary intention of a multi-level grievance process, but it would give an unfair advantage to the Union and unfairly prejudice the City in future matters. Accordingly, we deny the Union's motion to amend the request for arbitration.

INTERIM ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby,

ORDERED, that the motion to amend the Union's request for arbitration is denied.

Dated: New York, New York
November 24, 1998

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

SAUL KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER